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CHARLES ELMORE CRO

IN THE

SUPREME COURT OF THE UNITED STATES

No. 590

3146 #4
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OCTOBER TERM, 1941.

STANDARD OIL CO. OF NEW JERSEY,
Petitioner,

v.

THE UNITED STATES.

Petition for a Writ of Certiorari to the United States Court of Customs and Patent Appeals

September, 1941.

EDWARD P. SHARRETTS,
Attorney for Petitioner,
42 Broadway,
New York, N. Y.

Edward P. Sharretts

452 Appeal Printing Co., Inc., 130 Cedar St., New York

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OCTOBER TERM, 1941

STANDARD OIL CO. OF NEW JERSEY,
Petitioner,

v.

THE UNITED STATES.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CUSTOMS AND PATENT APPEALS

The Standard Oil Company of New Jersey prays that a writ of certiorari be issued to review the judgment of the United States Court of Customs and Patent Appeals entered June 9, 1941, affirming a judgment of the United States Customs Court.

Opinions Below

The decision of the United States Court of Customs and Patent Appeals which your Petitioner seeks to have reviewed by this Court was rendered on June 9, 1941 and is reported in *Standard Oil Co. of New Jersey* v. *The United States,* C.A.D. 174, and printed in the present transcript of record (pp. 14-19).

The decision of the United States Court of Customs and Patent Appeals affirmed a decision of the United States Customs Court. The decision of the United States Customs Court is reported in *Standard Oil Co. of New Jersey* v. *The United States,* C.D. 392 (R. 8, 9, 10, 11, 12).

The decision of the United States Customs Court affirmed the decision of the U. S. Collector of Customs at the port of New York. The Collector of Customs at the port of New York assessed certain fuel oil with a tax of ½ cent per gallon under Section 601(c)(4) of Title IV of the Revenue Act of 1932 (47 Stat. 260) and declined to allow the exemption provided in Section 630 of said Act as amended June 16, 1933 (48 Stat. 256); see also Collector's Memorandum (R. 5).

Jurisdiction

The judgment of the United States Court of Customs and Patent Appeals was entered June 9, 1941 (R. 20). The jurisdiction of this Court is invoked under Section 195 of the Judicial Code, as amended (28 U.S.C., Sec. 308); see also rules 42 and 38 of the revised rules of the Supreme Court of the United States.

Question Presented

The Standard Oil Company of New Jersey imported certain fuel oil into the United States and entered it in bond as permitted by Section 557 of the Tariff Act of 1930 (19 U.S.C.A., Sec. 1557). Later the said fuel oil was withdrawn from bonded warehouse and sold for use as fuel supplies on the Steamship "Leviathan", a vessel which had been sold by its American owners to British owners and registered as a British vessel. The said Steamship "Leviathan" was navigated under its own power to Rosyth, Scotland, without passengers or cargo and was there broken up into scrap metal. The Collector of Customs at the port of New York assessed a tax of ½ cent per gallon upon the fuel oil supplied to the "Leviathan" under Section 601(c)(4) of the Revenue Act of 1932 and refused to allow exemption from such tax

provided in Section 630 of the said Act for fuel oil sold for use as fuel supplies on vessels actually engaged in foreign trade. The question presented is: Was the Leviathan actually engaged in foreign trade within the meaning of said Section 630?

Constitutional Provision and Statutes

Art. 1, Sec. 8, Clause 3, Constitution of the United States (see Appendix p. 14).

Sec. 601(c)(4) Title IV of the Revenue Act of 1932 (This provision was originally enacted June 6, 1932, c. 209, Sec. 601(c)(4), 47 Stat. 260. It was extended to 1935, 1937, and 1939, by the following Acts and Resolutions: June 16, 1933, c. 90, §212, 48 Stat. 206; June 28, 1935, c. 333, 49 Stat. 431; June 29, 1937, c. 402, 50 Stat. 358. The text of the provision is printed at page 4 of the present petition).

Section 630 of the Revenue Act of 1932 (This section was added to the Revenue Act of 1932 on June 16, 1933, 48 Stat. 256. It was amended by the inclusion of certain additional matter on May 28, 1938, c. 289, Sec. 705, 52 Stat. 570, 26 U.S.C.A., Sec. 3451. The text of the provision in effect when the fuel oil was supplied to the Steamship "Leviathan" (January 21 and 22, 1938) is printed at pages 4 and 5 of the present petition).

Section 195 of the Judicial Code as amended, 28 U.S.C., Sec. 308 (see Appendix pp. 14, 15, 16).

Section 557 of the Tariff Act of 1930 (19 U.S.C.A., Sec. 1557) (see Appendix pp. 16, 17).

77 Cong. Rec. Part III, pp. 1312-1314 (for full discussion in the U. S. Senate see Appendix pp. 17, 18, 19, 20, 21).

Statement

The facts in the present case are all agreed to in a stipulation between counsel (R. 6, 7, 8).

It is conceded that 1,640,944 gallons of fuel oil were imported into the United States at the port of New York and entered into bonded warehouse under Warehouse Bond No. 103273 on January 18, 1938. It is conceded further that said fuel oil was sold for use as fuel supplies on the Steamship "Leviathan", a vessel of Great Britain; that the said fuel oil was laden aboard the "Leviathan" and used as fuel between New York and Rosyth, Scotland; that the "Leviathan" was sold while at the port of New York for the purpose of proceeding to Scotland under her own power to be there reduced to scrap metal; that she left New York in ballast without cargo or passengers.

The fuel oil in question was assessed at ½ cent per gallon under Section 601(c)(4) of Title IV of the Revenue Act of 1932, which provides as follows:

> "(4) Crude petroleum, ½ cent per gallon; fuel oil derived from petroleum, gas oil derived from petroleum, and all liquid derivatives of crude petroleum, except lubricating oil and gasoline or other motor fuel, ½ cent per gallon; gasoline or other motor fuel, 2½ cents per gallon; lubricating oil, 4 cents per gallon; paraffin and other petroleum wax products, 1 cent per pound. The tax on the articles described in this paragraph shall apply only with respect to the importation of such articles".

The Petitioner claims that it was exempt from such tax under Section 630 of the Revenue Act of 1932 as amended, which provides as follows:

> "SEC. 630. EXEMPTION FROM TAX OF CERTAIN SUPPLIES FOR VESSELS. Under regulations prescribed

> by the Commissioner, with the approval of the Secretary, no tax under this title shall be imposed upon any article sold for use as fuel supplies, ships' stores, sea stores, or legitimate equipment on vessels of war of the United States or of any foreign nation, vessels employed in the fisheries or in the whaling business, or actually engaged in foreign trade or trade between the Atlantic and Pacific ports of the United States or between the United States and any of its possessions. Articles manufactured or produced with the use of articles upon the importation of which tax has been paid under this title, if laden for use as supplies on such vessels, shall be held to be exported for the purposes of Section 601(b)".

If the "Leviathan" was actually engaged in foreign trade, the fuel oil was exempt from the tax.

The Collector's report which is in evidence by stipulation correctly states the Petitioner's position as follows (R. 5, 6):

> "The oil in question was laden aboard the S.S. 'Leviathan' and was used as fuel between New York and Rosyth, Scotland. If upon this voyage the 'Leviathan' actually engaged in foreign trade, the tax should not have been assessed, and the protest should be allowed. In the words of Mr. Justice Roberts in *Asiatic Petroleum Ltd.* v. *Insular Collector of Customs,* 297 U. S. 666. the section applies to fuel oil sold to all vessels, of whatever registry *trading with foreign countries".* (Italics supplied.)

The issue may, therefore, be narrowed to the question: Was the "Leviathan" actually engaged in foreign trade?

The Leviathan was not carrying merchandise or passengers but her navigation from New York to Rosyth, Scotland, was an obviously necessary part of a foreign

trade transaction, namely, the sale of the vessel and her reduction to scrap metal in Scotland. Furthermore, it is Petitioner's claim that the sale of the fuel oil to navigate the "Leviathan" from New York to Rosyth, Scotland, was a foreign trade transaction. However, Petitioner feels that it is not necessary to rely solely on the sale of the vessel or the sale of the fuel oil. "Navigation" of the vessel from New York to Rosyth, Scotland, was in itself foreign trade. Petitioner claims that the applicable principle was first announced more than a century ago in the famous case of *Gibbons* v. *Ogden,* 9 Wheat. 1. It was there decided that "navigation" *per se* comes within the commerce clause of the Constitution because it is universally acknowledged that navigation itself is a "branch of trade".

The decision of the United States Court of Customs and Patent Appeals holds that the "Leviathan" was not actually engaged in foreign trade within the meaning of Section 630 and that the fuel oil here in question was not entitled to the exemption there provided. The Petitioner seeks a reversal of that decision.

Reasons for Granting the Writ

1. Petitioner does not claim that a constitutional question is directly involved in the present proceeding. However, the power of the Congress to allow the exemption from the tax to fuel oil supplied to vessels engaged in foreign trade, as prescribed in Section 630 of the Revenue Act of 1932 is derived from Article 1, Section 8, Clause 3 of the Constitution. (*McGoldrick* v. *Gulf Oil Corp.,* 309 U. S. 414.) In the latter case this Court fully discussed the said Section 630 of the Revenue Act

of 1932 and Mr. Justice Stone speaking for this Court said with respect to said Section (op. p. 424):

> "By virtue of the terms already noted of §§601 and 630 of the Revenue Act of 1932, these provisions were extended to articles sold for fuel to vessels engaged in foreign trade, and the provisions of statutes and regulations relating to withdrawal from manufacturing bonded warehouses for export were thus extended to similar withdrawals of fuel oil for disposition as ships' stores".

At page 426 of the opinion Mr. Justice Stone says in referring to such fuel oil:

> "It cannot lawfully be removed from the manufacturing warehouse except for delivery for use as fuel to a vessel engaged in foreign commerce and it cannot lawfully be diverted from such destination and use and cannot, after delivery to the vessel, be landed in the United States".

At page 428 of the opinion Mr. Justice Stone says with respect to fuel oil thus withdrawn from bonded warehouse and supplied to vessels:

> "The laying of a duty on imports, although an exercise of the taxing power, is also an exercise of the power to regulate foreign commerce, *Hampton & Co.* v. *United States,* 276 U. S. 394, 411; *Board of Trustees* v. *United States, supra,* 58. The exemption of imports from the duty or the allowance of a drawback when they are devoted to particular purposes or uses, or when they are exported or otherwise sent out of the country, is likewise a regulation of foreign commerce, see *Gibbons* v. *Ogden,* 9 Wheat. 1, 201, 202; *Groves* v. *Slaughter,* 15 Pet. 449, 505".

In the light of the foregoing we quote the following from the opinion of the Court of Customs and Patent Appeals below (R. 17):

> "Appellant argues that foreign trade is a part of foreign commerce and that since navigation is a part of foreign commerce and since the Supreme Court has held that navigation was trade, the term 'engaged in foreign trade' used in section 630 must cover the transaction at bar.
>
> We are of the opinion that the decision in *Gibbons* v. *Ogden, supra,* has little, if any, bearing on the case at bar. Certainly the principle there announced is not controlling of the issue presented here".

Petitioner claims that the rule of interpretation repeatedly adopted by this Court in construing the phrase "commerce with foreign nations" in the commerce clause of the Constitution should have been followed by the lower Court in construing the phrase "foreign trade" in Section 630 of the Revenue Act of 1932. This Court has repeatedly treated the words "commerce" and "trade" as synonymous in dealing with questions of foreign and interstate trade. *Gibbons* v. *Ogden, supra,* pp. 192, 193; *United States* v. *Dewitt,* 9 Wall. 44; *Trade Mark Cases,* 100 U. S. 96; *License Tax Cases,* 5 Wall. 470; *Carter* v. *Carter Coal Co.,* 298 U. S. 238, 298.

It will be noted in the above quotations from the opinion of this Court in *McGoldrick* v. *Gulf Oil Corp., supra,* that this Court refers to the exemption in Section 630 as applying to "vessels engaged in foreign commerce" and to the section as "a means of regulating and promoting foreign commerce". Throughout the opinion the terms "foreign trade" and "foreign commerce" are used synonymously and interchangeably.

If, as decided by the lower Court, the "Leviathan" because of lack of cargo or because she was to be reduced

to scrap at the termination of her foreign voyage was not engaged in foreign trade, then, she was not engaged in foreign commerce. If she was not engaged in foreign commerce, the Congress had no power over her registration, clearance and navigation. *Gibbons* v. *Ogden, supra,* p. 190. While the immediate result of the judgment below is the denial of the exemption from the tax, yet, the findings upon which the judgment is based, namely, that the sale of the vessel for transportation to a foreign country, the sale of the fuel oil for her foreign voyage and the "navigation" *per se* of the vessel, do not constitute foreign trade, would, if accepted as final, constitute a modification of the principles repeatedly announced by this Court and, indeed, a serious modification of the power of the Congress over navigation.

2. It is well settled law that "navigation" *per se* regardless of cargoes is "commerce" within the meaning of that term as used in Article 1, Section 8, Clause 3, of the Constitution of the United States. In so deciding Mr. Chief Justice Marshall speaking for this Court in *Gibbons* v. *Ogden, supra,* pointed out that the Embargo Laws which applied to navigation were bitterly opposed in many sections of the country by men to whom could not be imputed a want of acuteness in discovering objections to the Embargo Laws, "Yet", says the great Chief Justice: "They never suspected that navigation was no branch of trade, and was, therefore, not comprehended in the power to regulate commerce (op. pp. 192, 193).

The Chief Justice says further: "No example could more strongly illustrate the universal understanding of the American people on this subject".

This Court following *Gibbons* v. *Ogden, supra,* has repeatedly held that the term "commerce" as used in the

Constitution includes "navigation" *per se*. *State Tonnage Tax Cases*, 12 Wall. 216; *Sherlock* v. *Alling*, 93 U. S. 103; *Sinnot* v. *Davenport*, 22 How. 243; *Cooley* v. *Board of Wardens*, 12 How. 314; *Lord* v. *Goodall*, 102 U. S. 544; *Henderson* v. *New York*, 92 U. S. 270; *Gilman* v. *Philadelphia*, 3 Wall. 724.

Petitioner contends that the decision of the Court of Customs and Patent Appeals holding that the navigation of the "Leviathan" from New York to Rosyth, Scotland, was not foreign trade was in conflict with the principles repeatedly announced by this Court.

3. The sale of the "Leviathan" by American owners to foreign owners and the transportation of the "Leviathan" from New York to Rosyth, Scotland, pursuant to such sale, was foreign commerce and foreign trade. *Crew Levick Co.* v. *Pennsylvania*, 245 U. S. 292; *Dahnke-Walker Milling Co.* v. *Bondurant Co.*, 257 U. S. 282. The latter case deals with interstate trade but the same principle applies to foreign trade *Bowman* v. *Chicago etc. R. Co.*, 125 U. S. 482. See also *Railroad Commission* v. *Texas etc. R. Co.*, 229 U. S. 336; *Texas etc. R. Co.* v. *Sabine Tram Co.*, 227 U. S. 111.

4. The sale of the fuel oil for use in navigating the "Leviathan" from New York to Rosyth, Scotland, was foreign commerce and foreign trade. *McGoldrick* v. *Gulf Oil Corp., supra.*

5. The exemption from the tax on the fuel oil supplied to the "Leviathan" was within the clear purpose of Section 630 of the Revenue Act of 1932. On this point Mr. Justice Stone speaking for this Court in *McGoldrick* v. *Gulf Oil Corp., supra*, says at page 427 of the opinion:

> "The obvious tendency of the exemption, from the tax laid upon importation of crude petroleum, when it or its product is used as ships' stores by vessels engaged in foreign commerce is to encourage importation of the crude oil for such use and thus to enable American refiners to meet foreign competition and to recover trade which had been lost by the imposition of the tax. That tendency, and the tendency of the sale of tax-free fuel to vessels engaged in foreign commerce to promote the commerce, were considerations to be taken into account by Congress in fixing the terms of the statute, and its adoption as a means of regulating and promoting foreign commerce was within the Congressional power. *Board of Trustees* v. *United States,* 289 U. S. 48."

The purpose of Section 630 was fully explained by Senator Reed of Pennsylvania who had the bill in charge when the amendment was offered in the United States Senate. (77 Cong. Rec., Part III, pp. 1312-1314.)

In 1932 the Congress in Section 601(c)(4) of Title IV of the Revenue Act of 1932 assessed a tax of ½ cent per gallon on fuel oil derived from petroleum. This had an unfortunate effect because vessels, touching at foreign ports, purchased their fuel supplies in such foreign ports thus avoiding the tax. The result was that the government was losing the tax and American companies were losing the business. In order to provide a remedy Congress, on June 16, 1933, amended the Revenue Act by enacting Section 630 (*Barham Co.* v. *United States,* 70 Treasury Decisions 1038, T.D. 48733). The obvious purpose of the amendment was to exempt from tax fuel oil supplied to any vessels privileged to stop at foreign ports, that is to say, vessels engaged in foreign trade, the fisheries, the whaling business and vessels plying between American ports on the Atlantic and American

ports on the Pacific. Thus Senator Reed in explaining the amendment said:

> "Mr. Reed: Mr. President, the idea is this: At the present time, ships under the American flag or foreign flags, engaged in the various services mentioned here, all have opportunity to buy their fuel oil at foreign ports, and since we have put a tax on that oil they have all been doing it. At the present time we are not getting any revenue out of vessels engaged in these services. We will not get any revenue out of them if this section passes; but Americans will get the business of selling to them, which, at present is prevented by the imposition of the tax".

See also report of Senator Harrison, Chairman of the Finance Committee on the amendment (Report No. 58, 73rd Congress, 1 Session—May 1, 1933 to accompany H.R. 5040).

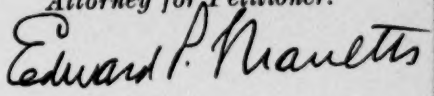
Obviously the "Leviathan" could have taken on sufficient fuel oil to carry her as far as Halifax and there taken on tax free fuel for the balance of her voyage. This would have been the very evil the amendment was intended to remedy.

Petitioner claims that the decision of the United States Court of Customs and Patent Appeals defeated one of the purposes of the amendment.

CONCLUSION

It is respectfully submitted that this petition for a writ of certiorari should be granted.

EDWARD P. SHARRETTS,
Attorney for Petitioner.



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